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Possible reform of investor-State dispute settlement (ISDS) — cost and duration

Note by the Secretariat

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I. Introduction

1. At its thirty-fifth session, the Working Group suggested that the Secretariat (i) prepare a list of the concerns about investor-State dispute settlement (ISDS) raised during its thirty-fourth and thirty-fifth sessions, (ii) set out a possible framework for its future deliberations, and (iii) consider the provision of further information to assist States with respect to the scope of some concerns (A/CN.9/935, para. 99).

2. Document A/CN.9/WG.III/WP.149 addresses items (i) and (ii). This Note considers the topic of cost and duration as a procedural aspect of ISDS and provides additional information on those topics. The Working Group had discussed those topics at its thirty-fourth session based on paragraphs 23 to 25 of document A/CN.9/WG.III/WP.142. In summary, the current ISDS practice has put into doubt the oft-quoted notion that arbitration represents a speedy and low-cost method for resolving investor-State disputes[1] with average costs exceeding $8 million per party and duration averaging between three to four years (A/CN.9/930/Rev.1, para. 36). Accordingly, concerns were expressed regarding increasingly high costs and lengthy proceedings.

3. As is the case for other documents provided to the Working Group, this Note was prepared with reference to a broad range of published information on the topic,[2] and does not seek to express a view on the desirability of reforms, which is a matter for the Working Group to consider.

II. Procedural efficiency of ISDS: cost and duration

A. General

Prevention of investor-States disputes

4. Before addressing the cost and duration of investor-State disputes, it should be understood that any dispute between a State and an investor is a burden on both parties. A dispute or even the possibility of a dispute could increase transactional costs of investors, which may result in loss of business opportunities. A dispute may entail economic and social costs for States, including a negative impact on its foreign investment inflow. Disputes generally result in the severance of the link between foreign investors and host States, which is counterproductive for both parties. Therefore, efforts are made by both investors and States to prevent disputes through various measures and to resolve them effectively, investor-State arbitration being a last resort recourse. There have been increasing efforts to highlight the importance of dispute prevention and of forms of dispute settlement other than arbitration (A/CN.9/930/Rev.1, para. 52).[3] At the thirty-fourth session, it was suggested that a model could be designed to relate duration and the level of costs to the benefits of investment to the investors, as a practical tool to prevent such disputes (A/CN.9/930/Rev.1, para. 39). It was also suggested that assistance could be provided to developing States to advise them through the ISDS process. While these are important aspects to bear in mind when assessing the need for and the forms reform could take, this Note focuses more on concerns expressed with regard to the cost and duration of investor-State arbitration.

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[1] UNCTAD, IIA Issues Note — Reform of Investor-State Dispute Settlement: In search of a Roadmap (June 2013), p. 4 available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d4_en.pdf.

[2] See bibliographic references published by the Academic Forum, available under "Additional resources" at http://www.uncitral.org/uncitral/en/publications/online_resources_ISDS.html.

[3] See for example, UNCTAD, UNCTAD Series on International Investment Policies for Development: "Investor-State Disputes: Prevention and Alternatives to Arbitration" (2010) available at http://unctad.org/en/docs/diaeia200911_en.pdf. In light of the perceived disadvantages of investment arbitration, the paper addresses the possibility of resolving disputes through negotiation, conciliation or mediation and dispute prevention policies that attempt to prevent disputes from emerging or escalating to formal investment disputes.

Damages awarded by ISDS tribunals

5. Damages awarded by ISDS tribunals against States have increased over the years with the average amount awarded to successful claimants reaching $110.9 million.[4] Compared to the mean and median amounts awarded prior to 2013 (respectively $76.3 million and $10.7 million), those awarded since 2013 have increased to $171 million and $40 million. This illustrates a 124 per cent increase in the mean amount awarded and 274 per cent increase in the median amount.[5] Such amounts, perceived as being excessive, have been the subject of growing concern as they have significant impact on States, particularly those with limited financial resources. However, the focus of this Note is on costs related to rendering of an award (thus the procedural aspect). In other words, this Note will concentrate more on the financial burden on investors and States in participating in ISDS proceedings.

B. Concerns identified by the Working Group

6. The Working Group undertook a preliminary discussion on costs and duration of ISDS at its thirty-fourth session under the general topic of procedural aspects of the arbitral process (A/CN.9/930/Rev.1, paras. 35–78). States and intergovernmental organizations shared their experiences in connection with ISDS. The following is a summary of the concerns expressed during the session.

Financial burden on the parties

7. It was widely felt that lengthy and costly ISDS proceedings raised concerns and practical challenges to respondent States as well as to claimant investors. Highlighting the resource-intensive nature of the proceedings, it was mentioned that the inclusion of ISDS provisions in investment treaties could have financial implications (A/CN.9/930/Rev.1, para. 37).

8. Particular attention was drawn to the fact that the high cost of ISDS paid with public funds was difficult to justify for developing States, whose financial and human resources were scarce and may pose a disproportionately heavy burden on smaller States. Certain States may struggle to meet the significant resources required for defending an ISDS claim and they may be faced with criticism for the use of public funds. In that context, it was noted that the cost of ISDS could compete with urgent developmental needs of those States (A/CN.9/930/Rev.1, para. 40).

9. It was also noted that the financial burden was not only on respondent States but also on claimant investors, particularly small and medium-sized enterprises. Increasing cost of ISDS proceedings may limit the access of such enterprises to ISDS mechanisms or deter their use,[6] thus depriving them of the protection provided to them under investment treaties. The Working Group noted that the cost of ISDS had risen to a level where it could be perceived as imposing a barrier to accessing the system to certain investors with limited financial resources (A/CN.9/930/Rev.1, paras. 41 and 64).

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[4] See Matthew Hodgson and Alastair Campbell, Damages and costs in investment treaty arbitration revisited, Global Arbitration Review (14 December 2017) available at http://www.allenovery.com/SiteCollectionDocuments/14-12-17_Damages_and_costs_in_investment_treaty_arbitration_revisited_.pdf (the "2017 MH Study"). The figure is based on 132 awards excluding the Yukos case, where more than $50 billion was awarded.

[5] Ibid.

[6] See, for example, paragraph 6 of article 8.39 of the Comprehensive Economic and Trade Agreement between the European Union and Canada (CETA), which states as follows: "The CETA Joint Committee shall consider supplemental rules aimed at reducing the financial burden on claimants who are natural persons or small and medium-sized enterprises. Such supplemental rules may, in particular, take into account the financial resources of such claimants and the amount of compensation sought."

Possible approaches to cost and duration

10. It was generally felt that deliberations relating to cost and duration should be fact-based, yet also noting that perceptions on those issues had formed the basis of criticisms on the legitimacy of the ISDS system (A/CN.9/930/Rev.1, paras. 42, 62 and 63). Section D of this Note summarizes existing data to facilitate a fact-based analysis by the Working Group.

11. It was emphasized that cost and duration of ISDS proceedings should not be examined in isolation, but by reference to suitable comparators, which might include other international dispute settlement bodies such as the International Court of Justice (ICJ) and the Dispute Settlement Body (DSB) of the World Trade Organization (WTO), and domestic court procedures (A/CN.9/930/Rev.1, paras. 43 and 62). Section D.5 addresses these comparators.

12. It was also emphasized that notions of cost and duration were relative in nature, and whether the process was excessively costly or lengthy should be determined on a case-by-case basis and taking into account the need for effective administration of justice. Therefore, it was highlighted that it would be important to draw a distinction between "excessive" or "unjustified" time and cost on the one hand, and "necessary" or "justified" time and cost on the other. In that regard, it was noted that the quality of outcomes should be balanced with the desire to reduce cost and duration (A/CN.9/930/Rev.1, paras. 42, 62, 71 and 72).

Possible reasons for increases in cost and duration

13. The Working Group also identified some of the reasons contributing to excessive cost and lengthy duration, which are summarized in section E.1 below (A/CN.9/930/Rev.1, paras. 44–48, 65). Particular attention was drawn to the lack of predictability as a cause for increased cost and duration (A/CN.9/930/Rev.1, para. 44), which is addressed in document A/CN.9/WG.III/WP.150.

Other related concerns

14. The Working Group also identified allocation of costs by arbitral tribunals in ISDS as a concern that merited further consideration, noting an emerging approach based on proportional allocation of costs (A/CN.9/930/Rev.1, paras. 53–55 and 66–67). This is dealt with in sections C.2 and D.4.

15. A further area of concern related to difficulties faced by successful States being unable to recover some or all of its costs from claimant investors and the need for rules on security of costs (A/CN.9/930/Rev.1, paras. 56, 66 and 68). This is dealt with in more detail in section C.3.

16. Concerns were expressed also with respect to third-party funding and other forms of external financing, which were available to investors and not to States, thus creating a structural imbalance between investors and States (A/CN.9/930/Rev.1, paras. 57, 64 and 69). Issues pertaining to third-party funding as well as their impact on other issues, such as conflicts of interest for arbitrators, collection and enforcement of costs awards will be addressed in due course in a separate Note by the Secretariat.

C. Analysis of cost and duration

1. Elements of cost and duration as well as their interrelationship

Elements of cost

17. There are various elements of cost that need to be borne by the parties when they engage in ISDS proceedings. They make up the funding required by claimant investors to bring their claims and for respondent States to respond to such claims until the final award is rendered.

18. Such costs include, among others, tribunal costs (for example, fees of arbitrators and their expenses, tribunal secretaries), administrative costs (for example, fees charged by arbitral institutions) and party costs (for example, fees paid by the parties to its counsel for legal representation and for experts).

19. The Working Group has taken note of the analyses suggesting that 80 to 90 per cent of costs in ISDS were associated with party costs (A/CN.9/930/Rev.1, para. 36). According to the Organization for Economic Cooperation and Development (OECD), party costs were estimated to average about 82 per cent of the total costs.[7] According to the Permanent Court of Arbitration (PCA), in large investment cases, counsel and expert fees may account for approximately 90 per cent of the overall cost.[8]

20. As will be illustrated in section D.2, the average sum of tribunal and administrative costs for investment disputes was $933,000. The mean party costs for claimant investors was $6,019,000 with the median being $3,375,000. The mean party costs for respondent States was $4,855,000 with the median being $2,793,000.[9]

21. There may be additional elements of cost, for example, costs related to the collection as well as enforcement or setting aside of awards in domestic courts as well as annulment through the ICSID proceedings.

Elements of duration

22. There exist different stages of investment dispute resolution. The pre-arbitration stage is when efforts are made by the parties to reach an amicable resolution of the dispute. This stage may involve alternative dispute resolution mechanisms other than arbitration and may also include the period where the potential claimant investor prepares its claims. Investment treaties typically feature cooling off or waiting periods whereby parties seeking to initiate arbitration proceedings are required to hold off for a specified period, during which an amicable settlement should be attempted.

23. The arbitration proceeding is usually deemed to commence when the notice/request of arbitration is received by the respondent State. In ICSID proceedings, a case is only initiated after it has been screened and registered. The composition of the arbitral tribunal would generally follow, where arbitrators are appointed by the parties or the appointing authority and where challenges may be made with regard to the arbitrators. Once the tribunal is composed, the arbitral proceedings will begin and the tribunal will usually have the flexibility to conduct the proceedings in such manner as it considers appropriate. This stage would involve submission of statements of claims and defence, other written statements, request for interim measures, submission of evidence, hearings and reports by expert witnesses. They may be both written and oral. Assistance may be sought from courts in taking of evidence. The hearings will then be declared closed upon which the tribunal would prepare and render an award.[10]

24. Once an award is rendered, parties may apply for corrections (revisions) or interpretation of the award to the tribunal. Parties may also apply to set aside the award in a domestic court or to annul the award under ICSID proceedings. The enforcement of the award would generally constitute the final stage of ISDS. As there is no operational mechanism in place to appeal ISDS awards, this Note does not take that aspect into account.

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[7] David Gaukrodger and Kathryn Gordon, "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing (2012), p. 17 available at http://dx.doi.org/10.1787/5k46b1r85j6f-en. UNCTAD had estimated in 2010 that legal fees amounted to 60 per cent of the total costs (supra note 3, p. 17).

[8] Dirk Pulkowski, Powerpoint presentation made at the Joint CIDS-UNCITRAL Expert Group Meeting (Geneva, 2–3 March 2017).

[9] Hodgson & Campbell, supra note 4. The study analysed the data pool of 324 awards.

[10] For an overview of an Arbitration under the ICSID Convention see https://icsid.worldbank.org/en/Pages/process/Arbitration.aspx.

25. The Working Group noted and concerns were expressed that the three most time-intensive stages were (i) the appointment/composition of the tribunal, (ii) disclosure, discovery or document production and (iii) the issuance of the award (the period between the final hearing and the rendering of the award including deliberations when drafting the award) (A/CN.9/930/Rev.1, paras. 48 and 65).[11] An additional stage is when enforcement takes place, which was reported in some cases to have exceeded the original arbitration proceedings in length (A/CN.9/930/Rev.1, para. 48).

26. As concerns in the Working Group have mostly been expressed with regard to arbitral proceedings (from notice of arbitration to rendering of the award), this Note also focuses on that stage. As will be illustrated in section D.3, the average duration of ISDS proceedings (from request/notice of arbitration to final award) is 3 to 4 years.

Correlation between cost and duration

27. With regard to the correlation between cost and duration of ISDS proceedings, there was a shared understanding in the Working Group that both were interlinked, as lengthy proceedings were likely to result in higher costs (A/CN.9/930/Rev.1, para. 38). However, there is insufficient empirical evidence indicating that increase in costs necessarily results in longer duration of the proceedings.

2. Allocation of costs: approaches and rules

28. At the thirty-fourth session, it was highlighted that allocation of costs by arbitral tribunals in ISDS warranted detailed consideration (A/CN.9/930/Rev.1, paras. 53 and 66).

29. There are different ways in which costs may be apportioned between the parties in ISDS. First, the "pay your own way" approach suggests that each party should bear its own costs and that tribunal and administrative costs should be split equally between the parties. Second, the "costs follow the event" approach suggests that a successful party should ordinarily recover its reasonable costs. Third, the "relative success" approach suggests that tribunals should seek to apportion/adjust costs based on parties' relative success on different issues raised during the proceedings. This approach can be viewed as a more detailed application of the "costs follow the event" approach as the cost award would reflect the relative success of the winning party in terms of the proportion of successful limbs of its claims (A/CN.9/930/Rev.1, para. 55).

30. Article 40(1) of the 1976 UNCITRAL Arbitration Rules includes elements of the "costs follow the event" approach, in providing that costs of arbitration (as defined in article 38) are to be borne "in principle" by the unsuccessful party.[12] With regard to party costs, article 40(2) provided that the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable. The 2010 UNCITRAL Arbitration Rules no longer distinguishes party

[11] This is confirmed in a recent working paper published by ICSID. See ICSID, Proposals for Amendment of ICSID Rules – Working Paper, Schedule 9 (Addressing time and costs in ICSID Arbitration), para 4 available at https://icsid.worldbank.org/en/Documents/Amendments_Vol_Three.pdf#.

[12] Article 40 of the 1976 UNCITRAL Arbitration Rules reads:

"1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable ..."

costs from the costs of arbitration and provides, in article 42, that the costs of the arbitration shall be in principle borne by the unsuccessful party.[13]

31. The ICSID Convention gives tribunals a broad discretion in deciding how costs should be apportioned between the parties, and does not provide guidance as to which of the above-mentioned approaches should be followed and in what circumstances.[14] Rule 28 of the ICSID Arbitration Rules provides guidance on the cost of proceedings.[15]

32. Different approaches may be witnessed in applicable investment treaties, which would generally override the cost provisions of the UNCITRAL Arbitration Rules or the ICSID Convention. Some recent investment treaties, including the CETA[16] and the EU-Singapore Free Trade Agreement,[17] have adopted the "costs follow the event" as the default approach to cost allocation.

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[13] Article 42 of the 2010 UNCITRAL Arbitration Rules reads:

"1. The costs of the arbitration shall in principle be borne by the unsuccessful party or parties. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case. ..."

Article 40 defines costs as follows:

"...

2. The term costs" includes only:

(a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 41;

(b) The reasonable travel and other expenses incurred by the arbitrators;

(c) The reasonable costs of expert advice and of other assistance required by the arbitral tribunal;

(d) The reasonable travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;

(e) The legal and other costs incurred by the parties in relation to the arbitration to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;

(f) Any fees and expenses of the appointing authority as well as the fees and expenses of the Secretary-General of the PCA. ..."

[14] Article 61 of the ICSID Convention reads:

"(1) ...

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award."

The proposed revisions to the ICSID Rules indicate that in allocating costs, tribunals should consider specific factors, such as outcome, the parties' conduct, the complexity of the issues, and the reasonableness of the costs claimed. See supra note 11, para. 223.

[15] Rule 28 of the ICSID Arbitration Rules (Cost of Proceeding) reads:

"(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

(a) At any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;

(b) With respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding."

[16] Paragraph 5 of article 8.39 of CETA reads:

"The Tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the Tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the claim. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such apportionment is unreasonable in the circumstances of the claim. If only parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims."

[17] Article 3.21 of the EU-Singapore Investment Protection Agreement

3. Security for costs

33. At the thirty-fourth session, it was pointed out that the respondent State might find itself not able to recover a substantial part or any of its costs in defending an unsuccessful, frivolous or bad faith claim by investors. Furthermore, investors might use shell companies, or be impecunious, making recovery impossible (A/CN.9/930/Rev.1, paras. 53 and 56). Accordingly, the Working Group identified difficulties faced by successful respondent States in recovering costs from claimant investors as another area of concern. That issue was highlighted as exemplifying an imbalance between parties, because States, given their permanence, were in a different position from investors, who might be unwilling or unable to pay (A/CN.9/930/Rev.1, paras. 56 and 68). It was further mentioned that the situation was aggravated by the fact that the possibility of obtaining security for costs was not provided for under investment treaties and in certain arbitration rules.

34. Article 26(2)(c) of the 2010 UNCITRAL Arbitration Rules provides that the arbitral tribunal may, at the request of a party, grant interim measures, which may include an order for a party to provide a means of preserving assets out of which a subsequent award may be satisfied. Article 42(2) states that the arbitral tribunal shall in the final award or, if it deems appropriate, in any other award, determine any amount that a party may have to pay to another party as a result of the decision on allocation of costs. In combination, arbitral tribunals generally have the power to grant security for costs under the UNCITRAL Arbitration Rules.

35. Article 47 of the ICSID Convention provides that, except as the parties otherwise agree, a tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.[18] This provides a basis for respondent States to request security for costs as a provisional matter when a claimant investor brings a clearly dubious claim or is unwilling or unable to cover the respondent State's costs.

36. In a decision of 13 August 2014, an ICSID tribunal rendered by majority an order on security for costs.[19] Furthermore, the arbitral tribunal sanctioned the claimant's failure to comply with the order on security for costs.[20] While the circumstances of the case may have been exceptional,[21] it provides an example of security for costs being awarded in an investment arbitration.

37. Considering that security for costs in ISDS proceedings have been rare compared to commercial arbitration, the Working Group may wish to discuss policy and practical considerations on whether and under what circumstances ISDS tribunals should be allowed to order security for costs. The Working Group may also wish to discuss the topic based on the working paper to be prepared on third-party funding.

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[18] See also Rule 39 of the ICSID Arbitration Rules on provisional measures. A party may seek provisional measures at any time after proceedings have been instituted.

[19] *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Security for Costs (13 August 2014) available at https://www.italaw.com/sites/default/files/case-documents/italaw3318.pdf. This is the first publicly reported cases in which a security for cost was granted by an ICSID tribunal.

[20] *RSM Production Corporation v. Saint Lucia*, ICSID Case No. ARB/12/10, Decision on Saint Lucia's Request for Suspension or Discontinuation of Proceedings (8 April 2015) available at https://www.italaw.com/sites/default/files/case-documents/italaw4254.pdf.

[21] Supra note 19, para. 86. The majority of the tribunal distinguished the exceptional circumstances in this case from all the previous cases, recording that the difference between the present proceeding and previous ICSID arbitrations in which the request for security for costs was in every case denied, is that in this case the circumstances which were brought forward in other proceedings occur cumulatively.

D. Data on cost and duration of ISDS

1. Lack of comprehensive and consolidated information

38. While the need for deliberations relating to cost and duration to be fact-based was constantly highlighted by the Working Group, there is, at present, no comprehensive database that contains consolidated information about cost and duration of ISDS cases. Moreover, final awards that typically contain statements of cost are not always publicly available. Furthermore, as had been evidenced, an individual case involving a large claim may distort relevant data on average cost and duration of ISDS. ICSID publishes statistical information about its cases and information relating to duration of each individual case can be obtained however not in a consolidated manner.

39. Difficulty in presenting relevant data is illustrated in the study by Jeffery Commission (the "JC Study").[22] Of the 138 ICSID arbitrations (2011–2015) surveyed, data on costs was not publicly available for the 45 proceedings that were discontinued or settled. As for the remaining 93 arbitrations that were decided by a tribunal, data on costs was not necessarily available for the following reasons: (i) the award itself was not yet publicly available; (ii) the award was publicly available but costs data was not included in any form; or (iii) some but not all costs data was included in the award. As a result, data on costs was available for claimant investors in 55 arbitrations and respondent States in 56 arbitrations. Details on tribunal costs were available in 40 awards.

40. In considering the data on duration of the proceedings, the fact that a number of disputes are discontinued/settled poses difficulties in capturing the average duration of ISDS proceedings per se. The Working Group may wish to exercise caution in comparative analyses, given the multiple factors that can differentiate one proceeding from another. These may include: (i) the complexity of a particular case; (ii) changes in the composition of counsel or the tribunal (including through challenges); (iii) the use of certain procedural mechanisms (such as bifurcation and amicus curiae applications); (iv) translation of documents and the award; (v) the emergence of post-hearing evidentiary or legal issues and (vi) dissenting opinion to the final award.

41. In this context, this Note sets out empirical data that is publicly available but not comprehensive, as illustrated in a limited number of studies on the topic. The Working Group may wish to take into account the above-mentioned limitations when analysing the information below.

2. Existing data on costs

42. In 2012, OECD concluded that legal and arbitration costs for claimants and respondents combined in recent ISDS cases averaged about $8 million and could exceed $30 million per case.[23] This figure has been quoted in a number of subsequent documents.[24]

Tribunal costs

43. The 2017 MH Study indicates that the mean tribunal costs increased from 746,000 USD (median $590,000) at the end of 2012 to $1,118,000 (median $905,000),

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[22] Jeffery Commission, "How long is too long to wait for an award", Global Arbitration Review (18 February 2016), "How Much Does an ICSID Arbitration Cost? A Snapshot of the Last Five Years", Kluwer Arbitration Blog (29 February 2016), and "The duration and costs of ICSID and UNCITRAL investment treaty arbitrations", Funding in Focus Report Three, Vannin Capital (July 2016) available at https://www.vannin.com/downloads/funding-in-focus-three.pdf. The study is based on an analysis of 138 ICSD arbitration between 2011 and 2015.

[23] OECD, supra note 7. The OECD Secretariat surveyed 143 publicly available ISDS arbitration awards as of August 2011 with 28 award providing information about tribunal and party costs. Eighty-one awards provided some information about costs while 62 provided none.

[24] UNCTAD, supra note 1 and European Commission, Investor-to-State Dispute Settlement (ISDS) Some Facts and Figures (2015) available at http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153046.pdf.

considering 89 cases from 2013 onwards.[25] This indicates a 50 per cent increase in both mean and median tribunal costs.

44. The JC Study reveals that the mean ICSID tribunal costs was 883,000 USD (median $875,900), considering 40 cases from 2011 to 2015.[26] The 2014 MH Study estimated ICSID tribunal costs at $769,000 and the 2017 MH Study at $1,042,000.

45. The JC Study also reveals that the tribunal costs in majority of the UNCITRAL arbitrations were $1 million or less.[27] The 2014 MH Study estimated UNCITRAL tribunal costs at $853,000 and the 2017 MH Study at $1,384,000.[28]

46. The 2017 MH Study suggests that while disparity between ICSID and UNCITRAL tribunals may have grown when comparing mean tribunal costs, median costs are rather closely aligned between ICSID ($910,000) and UNCITRAL ($905,000) tribunal costs.

47. In 2011, the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) reported that the average sum of tribunal and administrative cost of SCC's investment cases was €290,936.[29]

Party costs

48. The 2014 MH Study indicated that the average party costs were $4,437,000 for claimant investors and $4,559,000 for respondent States.[30] The median amount was 3,145,000 USD for claimants and $2,286,000 for respondents. In most cases, claimants incurred considerably greater costs than respondents, which may be the consequence of the claimants bearing the burden of proof and the tendency for many States to run cost-driven tender processes.

49. With respect to ICSID arbitration, the JC study reveals that cost incurred by claimant investors was on average $5.6 million and for respondent States $4.9 million.[31] The median figures for claimant and respondent costs were significantly lower: $2.9 million for claimants, and $3.7 million for respondents. In 64 per cent of the arbitrations, claimant costs were below $5 million. In 68 per cent of the arbitrations, respondent costs were below $5 million.

50. With respect to UNCITRAL arbitration, the JC Study shows that cost incurred by claimants was on average $7.3 million and for respondents $4.71 million. In 80 per cent of the arbitrations, claimant costs were below $5 million. In 73 per cent of the arbitrations, respondent costs were below $5 million.

51. The 2017 MH Study illustrate an increase in party costs in comparison to the 2014 Study. The average party costs were $7.4 million for claimants (68 per cent increase) and $5.2 million for respondents (13 per cent increase).[32] The median

[25] Hodgson & Campbell, supra note 4. See also Matthew Hodgson, Counting the costs of investment treaty arbitration, Global Arbitration Review (24 March 2014) available at http://www.allenovery.com/SiteCollectionDocuments/Counting_the_costs_of_investment_treaty.pdf (the "2014 MH Study"). The 2017 MH study analyses the data pool of 324 awards and 52 decisions on annulment. The 2014 MH Study reviewed 176 cases in which an award or decision was publicly available as of 31 December 2012. The 2017 MH Study reviewed 140 cases which were publicly made available from 31 December 2012 to 31 May 2017.

[26] Jeffery Commission, supra note 22. The Study notes that in the 27 of the 40 ICSID cases, tribunal costs were $1 million or less.

[27] Twenty-two out of 40 awards rendered between 2010 and 2015, of which 28 included details on tribunal costs.

[28] However, considering that the tribunal costs in Yukos were $11.4 million and, if that figure is excluded from the 2017 Study data pool, mean UNCITRAL tribunal costs is just over $1 million.

[29] SCC Statistics 2011, p. 4 available at https://sccinstitute.com/statistics/statistics-2008-2016/.

[30] Out of the 176 cases reviewed, data on costs were available in 73 and 66 cases respectively for claimants and respondents.

[31] This takes into account 55 and 56 ICSID arbitrations between 2011–2015 where information on costs was available respectively for claimants and respondents.

[32] The Working Group should note that the average figures may have been distorted by the Yukos cases, where the claimants' party costs were reported to be $81.4 million and the respondent's party costs being $31.5 million.

amount was $4.2 million for claimants (34 per cent increase) and $3.4 million for respondents (48 per cent increase). The 2017 MH Study concludes that the average party costs of all existing cases (based on 177 cases for claimants and 169 cases for respondents) stand at $6 million for claimants and $4.9 million for respondents.

Significant proportion of party costs

52. The data confirms the understanding of the Working Group that party cost. account for a significant portion of overall costs (see para. 19 above). According to the 2017 MH Study, the sum of average party costs ($10.9 million) is approximately 9.85 times greater than the average tribunal cost ($1.1 million).

Sample cases

53. The following provides some example cost figures provided by PCA on ISDS cases it administered.[33] For example, the amount in dispute in *Chemtura Corporation v. Canada* (2010)[34] was approximately $79 million. The overall cost of the proceedings was $7.5 million, which was composed of tribunal costs (9.1 per cent), administrative costs (0.03 per cent), claimants costs (17.17 per cent) and respondent's costs (73.7 per cent). In *Dunkeld International Investment Ltd v. Belize* (2016),[35] the amount in dispute was approximately $175 million with the overall cost at €6.1 million. Claimant's costs composed 70.18 per cent of the total costs with respondent's cost also composing 19.73 per cent. In *Almas v. Poland*,[36] the amount in dispute was 23 million. The overall cost was 1.08 million, with tribunals costs reaching 19.18 per cent, claimant costs 60.11 per cent and respondents costs 17.59 per cent of the overall cost. These examples also illustrate that depending on the circumstances of the case, elements of costs could vary to a certain extent.

3. Existing data on duration

54. In 2009, it was reported that the average duration of ICSID arbitrations was 3.63 years (1,325 days) from filing of the request for arbitration to the date of the final award.[37] It was also reported that the average time between a hearing on the merits and an award was 425 days.

55. ICSID has published the average duration of arbitrations in its annual reports. In 2011, it was reported that the average duration of arbitration proceedings concluded in the course of the 2010 and 2011 fiscal year (from 1 July to 30 June), calculated from registration of the request for arbitration to conclusion of the proceeding, was 43 months in 2010 and 31 months in 2011.[38] The average duration of proceedings calculated from the tribunal constitution to the conclusion of proceedings was 37 months in 2010 and 25 months in 2011.[39] It was further reported that the majority of arbitrations concluded in 2012 and in 2013 lasted between three to four years from the date of the tribunal's constitution.[40] Those concluded in 2014 lasted on average just over three and a half years.[41] That figure slightly increased to 39 months in 2015.[42] More recently, ICSID reported that the average length of the cases from 2015 to 2017 was 3 years and 7 months from the tribunal constitution to an award.[43] When broken down by the type of proceeding, the average length was: (i) 13 years 9 months

[33] Pulkowski, supra note 8.
[34] Case details are available at https://pca-cpa.org/en/cases/66/.
[35] Case details are available at https://pca-cpa.org/en/cases/23/.
[36] Case details are available at https://pca-cpa.org/en/cases/118/.
[37] Anthony Clair, "ICSID arbitration: How long does it take?", Global Arbitration Review (27 October 2009). The article was based on a review of the 115 ICSID cases resulting in an award from the creation of ICSID until 1 July 2009.
[38] ICSID, 2011 Annual Report, p. 34. ICSID Annual Reports are available at https://icsid.worldbank.org/en/Pages/resources/ICSID-Annual-Report.aspx.
[39] Ibid.
[40] ICSID, 2012 Annual Report, p. 34; and 2013 Annual Report, p. 30.
[41] ICSID, 2014 Annual Report, p. 30.
[42] ICSID, 2015 Annual Report, p. 31.
[43] ICSID, supra note 11, Schedule 9, para. 3. The ICSID Secretariat reviewed 63 cases which concluded with an award in the period 1 January 2015 to 30 June 2017.

applies to domestic courts where States are financially responsible for the operation of the courts. Taking these into consideration, the Working Group may wish to further specify what other comparators and what type of information would be useful for its deliberation of the topic (for example, very complex commercial arbitration cases).

International Court of Justice

68. Established in 1945, ICJ is the principal judicial organ of the United Nations. Its role is to settle, in accordance with international law, legal disputes submitted to it by States and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialized agencies.

69. A review of the information on the ICJ website indicates that the average duration of a contentious case is two years.[50] However, certain disputes have lasted longer. For example, the dispute between Croatia and Serbia on the application of the Genocide Convention[51] as well as the maritime dispute between Peru and Chile took six years for a judgment on the merits.[52] In the extreme case, the maritime delimitation and territorial questions between Qatar and Bahrain took almost ten years.[53]

70. The overall budget of ICJ for the biennium 2016–2017 was $45.8 million and is covered by the regular budget of the United Nations.[54] $14.2 million was allocated to cover the salary of the ICJ judges (approximately $523,253 per judge), their pensions, other expenses and allowances. For the operation of the Registry, $24.4 million was apportioned to provide legal, diplomatic, linguistic and technical support for the Court. In certain instances, the General Assembly grants a supplementary budget for specific cases which require additional resources.[55] There is no concrete data on the average cost of ICJ contentious cases, but it is estimated that an advisory proceeding could range from $450,000 to $600,000.[56]

71. As to costs borne by States in ICJ proceedings, there is no reliable data as no cost awards are made. This generally applies to cases at International Tribunal for the Law of the Sea (ITLOS), WTO as well as State-to-State arbitration. Furthermore, States rarely disclose how much they spent on conducting a case. Financial assistance provided through the Secretary-General's Trust Fund[57] may, however, provide a glimpse. On 24 May 2004, financial assistance of $350,000 was awarded respectively to Benin and Niger to defray the expenses in connection with the submission of their boundary dispute to ICJ.[58] On 28 January 2008, Djibouti was awarded an initial advance of $136,260 in connection with the institution of proceedings in a case concerning Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France).[59]

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[50] Information is available at http://www.icj-cij.org/en/list-of-all-cases. A contentious case deals with legal disputes between States submitted to the Court by States that are State Members of the United Nations and others that have become parties to the ICJ Statute.

[51] For an overview of the case, see http://www.icj-cij.org/en/case/118.

[52] For an overview of the case, see https://www.icj-cij.org/en/case/137.

[53] For an overview of the case, see http://www.icj-cij.org/en/case/87.

[54] *Official Records of the General Assembly, Seventy-second Session, Supplement No. 4* (A/72/6, Sect. 7), p. 2.

[55] Ibid., *Supplement No. 4* (A/72/4), paras. 23–26. See also General Assembly resolution 71/272. An additional $120,000 were apportioned for the appointment of experts in a case concerning Maritime Delimitation in the Caribbean Sea and the Pacific Ocean (Costa Rica v. Nicaragua).

[56] Ibid., para. 27. Advisory opinions are non-binding rulings on questions of international laws referred to the Court by United Nations organs or specialized agencies.

[57] The statutory purpose for the establishment of the Secretary-General's Trust Fund in 1989 was to encourage the peaceful settlement of disputes by providing financial assistance to States as an incentive to submit their disputes to ICJ. The Fund operates on the basis of voluntary contributions. The financial assistance is granted on the condition that it is used by the receiving State to defray expenses incurred in connection with the submission of a dispute to the Court and the costs of implementing a judgment. Additional information is available at http://www.un.org/law/trustfund/trustfund.htm.

[58] Report of the ICJ to the General Assembly, Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the ICJ (A/59/372), para. 5.

[59] Report of the ICJ to the General Assembly, Secretary-General's Trust Fund to Assist States in the Settlement of Disputes through the ICJ (A/63/229), para. 4.

World Trade Organization

72. WTO has a dispute settlement mechanism to address disputes arising out of its agreements.[60] WTO indicated target durations for each stage of the process, with 60 days for consultations/conciliation/mediation, 45 days for the setting up of the panel and the appointment of the panellists, 6 months for the final panel report and 3 months for circulation to WTO members. If there is no appeal, DSB is expected to adopt the panel report in 60 days, which means that the dispute would be resolved in approximately one year. If there is an appeal, the Appellate Body is expected to produce its report, not exceeding 60 to 90 days. DSB would then adopt the report of the Appellate Body within 30 days, with the dispute being resolved in approximately one year and three months.

73. Recent studies indicate that these time frames have seldom been met. For example, statistics indicate that for consultation requests submitted between 2007 and 2011, the average duration till the adoption of a total of 40 report by DSB (including 27 panel and 13 Appellate Body reports) were 28 months. They further indicate that 32 per cent of the disputes were resolved in less than 2 years with 50 per cent requiring 2 to 3 years.[61] A more detailed analysis reveals that the average duration of consultations (from request to establishment of panel) was 6.6 months, of panel proceedings 15.1 months and of the appellate proceedings 3.3 months.[62]

74. It is difficult to extricate from the budget of WTO the amount allocated for its dispute resolution mechanism but the 2016 budget of the WTO Appellate Body was approximately 7.5 million Swiss francs. Like ICJ, the budget of the Appellate Body is covered by contributions made by WTO members and disputing parties do not bear any costs other than their regular contributions.

75. Although private law firms participate in the preparation of the parties' written submissions to a panel or the Appellate Body, there is lack of information on the cost of such representation. States usually do not reveal how much was spent on a specific case. Moreover, some States have internalized the cost for undertaking dispute settlement within WTO, which makes it even more difficult to assess the party costs. The maximum fees that may be charged by the Advisory Centre on WTO Law provides a glimpse of relevant costs. For example, the Advisory Centre may charge 72,000 to 144,000 Swiss francs for panel proceedings and 43,000 to 85,000 Swiss francs for Appellate Body proceedings.[63]

E. Explanations on increasing cost and duration of ISDS and policy objectives for reform

1. Reasons for lengthy and costly proceedings

76. There may be a number of explanations on why the cost and duration of ISDS proceedings have become so high and lengthy as well as on why they have increased recently. Furthermore, the explanations would vary depending on the circumstance of each case.

77. At its thirty-fourth session, the Working Group noted some elements which could contribute to the level of cost of ISDS proceedings (A/CN.9/930/Rev.1, paras. 45–47 and 65). This section attempts to categorizes and summarize such factors, which may have contributed to increased cost and duration.

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[60] See Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU, annex 2 of the WTO agreement)

[61] Arie Reich, The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis, EUI Department of Law Research Paper No. 2017/1, available at http://dx.doi.org/10.2139/ssrn.2997094

[62] Louise Johannesson and Petros C. Mavroidis, The WTO Dispute Settlement System 1995–2015: A Data Set and its Descriptive Statistics, IFN Working Paper No. 1148 (2017) available at http://www.ifn.se/wfiles/wp/wp1148.pdf

[63] Information is available at http://www.acwl.ch/fees/

Dispute itself

78. The first category of explanations is derived from the dispute itself.

79. The fact that the majority of the claims is based on investment treaties and not on contracts may be one explanation as it entails issues of international law. The complexity of cases and the fragmented nature of investor protection provisions in a number of different investment treaties could provide another. In general, the open-ended nature of legal issues and the need to study numerous previous arbitral awards as well as other legal sources may illustrate why parties and tribunals need extra time. Complexity of cases may require extensive volume of evidence to be submitted, which may also entail translation of such material. The quality of the factual records could also impact the overall duration of the proceedings.

80. The overall cost of ISDS cases is seemingly closely linked with the amount being claimed by investors. The 2017 MH Study indicates that the mean amount claimed in investment arbitrations increased significantly to $2.37 billion (compared to $491.7 million in the 2014 Study). [64] The median amount claimed was $196.4 million, which was an increase from $66.1 million in the 2014 Study.

81. The 2017 MH study, however, provides that despite the increase in the amount claimed and the overall costs, the average length of the proceedings increased by six months, from 3.7 years to 4.3 years. It further notes that the increase in median duration was almost negligible, from 3.6 years to 3.7 years. This may imply that the amount claimed by investors do not necessarily have an impact on the duration of the proceedings.

Behaviour of the parties and their legal counsel

82. The second category of explanations is derived from the behaviour of the parties to the dispute and/or their legal representatives.

83. For example, both claimant investors and respondent States take extensive time in preparing their case and in making their submissions. As respondents, States generally require more time to respond to ISDS claims as they may need to coordinate among a number of authorities, to engage legal counsel and experts to defend their case as well as to gather relevant evidence. The willingness to obtain best possible representation and to develop adequate defences explain delays and increased costs, though States generally go through a tender process to reduce costs. During the thirty-fourth session of the Working Group, it was emphasized that States should be given sufficient time to respond to claims (A/CN.9/930/Rev.1, para. 50). In that context, the Working Group may wish to consider the preparedness and readiness of States in responding to ISDS claims.

84. The lack of a rule of binding precedent and a consequent lack of predictability may place parties and their legal counsel under a duty to submit all available arguments, whether or not those arguments had been accepted or rejected by earlier tribunals (A/CN.9/930/Rev.1, para. 44). The fact that many legal issues remain unsettled leads parties to invest extensive resources to develop a legal position by studying numerous previous arbitral awards. [65]

85. Parties may also be tempted to present all possible claims to the tribunal due the fact that (i) decisions are being made by the tribunal appointed for that specific dispute; and (ii) even if prior tribunals have made consistent decisions, there is the possibility that the tribunal at hand might decide otherwise. Moreover, the fact that the final award is not subject to appeal puts burden on the parties to raise all issues of fact and points of laws. For example, UNCTAD noted that large law firms, who dominate the ISDS field, tend to mobilize a team of attorneys for each case who employ expensive litigation techniques, which include intensive research on each arbitrator candidate, far-reaching

[64] If the figures for the Yukos case are excluded, the average amount claimed was $1.1 billion.

[65] UNCTAD, supra note 1.

and burdensome document discovery and lengthy arguments about minutest case details.[66]

86. Claims by shell companies, other abusive practices and inflated or unsubstantiated/frivolous claims as well as delay tactic by the parties (including the use of multiple forums leading to concurrent proceedings) may also have the potential to increase cost and duration of ISDS proceedings. The fact that the average amount claimed by ultimately successful claimants was $794 million compared to $1,539 million claimed by unsuccessful claimants indicates that flawed claims have driven up the cost of ISDS proceedings. In that context, existing mechanisms to dismiss frivolous claims and to address other abusive practices at an early stage may not be satisfactory or efficient.

Composition of the tribunal and the conduct of proceedings

87. The third category of explanations relate to the composition of the arbitral tribunal and the conduct of the proceedings.

88. Delays in the appointment or constitution of the tribunal would likely have a negative effect on the duration of the ISDS proceedings.[67] It should also be noted that disclosure requirements may sometimes lead to delays. The Working Group also noted that parties needed to expend considerable sums in appointing tribunal members.

89. The fact that a small number of arbitrators are commonly appointed in a number of cases may also provide an explanation to the delays. Unavailability of the arbitrators to fully devote themselves to an ISDS case (due to multiple appointments or other engagements as counsel or experts) could be an additional reason.

90. As noted by the Working Group, how proceedings are conducted is an important element contributing to the overall length and cost of ISDS proceedings. Tribunal dynamics leading to lengthy deliberations and sometime dissenting opinions may have an impact on the time required to render an award. Ineffective case management, lack of organization and extensive hearings could all contribute to longer duration and increased costs. Limited use of procedural tools such as timetables and time limits, and illiteracy with modern technologies may result in unnecessary delays and costs.

91. The perceived reluctance by tribunals to act decisively in certain situations for fear of being challenged, or of the award being set aside or annulled, may also explain ineffective case management by the tribunals. For example, decisions on granting multiple extensions of time, on late introduction of new evidence, or on rescheduling of hearings at last minute, may be overly attentive to due process considerations or based on an excessively cautious approach.

Systemic reasons

92. At the thirty-fourth session, it was pointed out that the increase in costs may be related to systemic issues and the structure of the ISDS regime, or, alternatively, the lack of a system. It was added that these issues had led to a lack of consistency and, importantly for States as respondents in particular, a lack of predictability of outcome (A/CN.9/930/Rev.1, para. 46).

2. Reform objectives

93. When a dispute arises between an investor and a State, the objective of the parties would be to resolve the dispute in a fair and effective manner. Taking into account information provided above, the Working Group may wish to reach a shared understanding on the policy objective of ISDS reforms relating to cost and duration including whether and how to address the concerns identified. For example, it may be

[66] Ibid

[67] In this regard, the role of the appointing and designating authority would need to be discussed, which is dealt more in detail in document A/CN.9/WG.III/WP.152. It should also be noted that parties generally find that this phase is too short

to provide a mechanism where parties are able to resolve their disputes reasonably, fairly and effectively. The need for the tribunal to render a "correct" award may also be emphasized along with the quality of the award or outcomes and ultimately enforceability (A/CN.9/930/Rev.1, paras. 59 and 71). The Working Group may also wish to confirm that adequate time should be provided to both claimant investors and respondents States to prepare for the proceedings and to arbitral tribunals to carefully consider the case and to render their award.

94. At the Working Group, it was highlighted that a distinction could be made between time and cost that were excessive and unjustified and that were necessary and justified. Yet, it was also mentioned that even justified cost and time may be a heavy burden on developing States and small- and medium-sized enterprises.

95. At the thirty-fourth session, it was stated that excess costs could be attributed in part to abusive practices, parallel proceedings, the absence of clear procedures, and the absence of an inefficient mechanisms to dismiss frivolous claims at an early stage (A/CN.9/930/Rev.1, para. 46). With regard to duration, it was noted that the appointment of the tribunal members, discovery or document production, and the issuance of awards were the most time-consuming stages leading to lengthy ISDS proceedings (A/CN.9/930/Rev.1, para. 65).

96. Lastly, the Working Group may also wish to recall comments made at the thirty-fourth session that concerns regarding cost and duration have to be examined as a whole; its constituent parts interacted in different ways, so that once the various concerns had been identified, it would be necessary to consider them from a systemic viewpoint (A/CN.9/930/Rev.1, para. 59). In that context, whether possible reforms must be addressed as a multilateral level is another question for the Working Group to consider.

F. Efforts to address cost and duration: desirability of reforms

Preliminary views expressed by States

97. Without prejudice to its future work on the topic, the Working Group has previously indicated some possible solutions to address concerns relating to cost and duration. Moreover, attention was called to the need to consider the issues in the broader context of innovations in investment treaties and in arbitration rules. In that context, this section provides a general overview of possible measures to improve the cost- and time-effectiveness of ISDS proceedings.

98. The Working Group may wish to note, however, that such efforts, which may be viewed as an indication of the desirability of or the need for reforms, have not necessarily targeted ISDS specifically and have attempted more generally to tackle inefficiencies in international arbitration. Moreover, while the need to distinguish between justified and unjustified cost and time was highlighted by the Working Group, those efforts have been undertaken without such clear distinction.

99. Current efforts to increase the efficiency of the proceedings have been made by States in the investment treaties, by arbitration institutions through the revision of their rules[68] or other guidance material, and by tribunals with regard to case management based on the discretion provided to them. UNCITRAL also has revised its Arbitration Rules in 2010 to enhance the efficiency of arbitration under the Rules and in 2013 to incorporate the UNCITRAL Transparency Rules in Treaty-based Investor-State Arbitration.

[68] For example, the Singapore International Arbitration Centre (SIAC) set up a separate set of rules to address the conduct of international investment arbitration. See SIAC, "SIAC Announces Official Release of the SIAC Investment Arbitration Rules" (30 December 2016) available at http://www.siac.org.sg/69-siac-news/505-siac-announces-official-release-of-the-siac-investment-arbitration-rules. The text of the SIAC IA Rules 2017 is available at http://www.siac.org.sg/our-rules/62-our-rules/rules/504-siac-ia-rules-2017.

100. At the thirty-fourth session, it was mentioned that disputing parties also had a role to play in determining the overall duration of an ISDS proceeding (A/CN.9/930/Rev.1, para. 49). It was mentioned that parties could choose to use forms of dispute settlement other than arbitration (negotiation, consultations, diplomatic efforts or mediation). Disputing parties also had the opportunity to control both duration and cost of arbitration through effective case management[69] and their decisions, including in selecting counsel and experts, in considering their choices of arbitrators and of arbitration institutions to administer the case, in agreeing on the procedural timetable, in deciding to bifurcate proceedings, and in seeking early dismissal where possible (A/CN.9/930/Rev.1, para. 51).

Possible measures to address concerns about cost and duration

101. The following is a non-exhaustive list of possible measures to address the concerns expressed about cost and duration as well as to improve the efficiency of ISDS, for consideration by the Working Group. In particular, the Working Group may wish to take into account significant reform efforts underway by ICSID to tackle concerns regarding time and cost in ICSID arbitration (marked with an *):[70]

(1) Address excessive burden on the parties to conduct ISDS proceedings

- Promotion of dispute prevention policies
- Dispute resolution using means other than arbitration such as mediation*, ombudsman facilities
- Development of expedited procedures and/or simplified procedures for small claims
- Use of third-party funding for claimants and explore third-party funding for States
- Establishment of advisory centres similar to the Advisory Centre on WTO Law or funds to support parties (in particular, developing States and SMEs) similar to the Trust Fund established for the purposes of ICJ

(2) Stricter timelines to address lengthy duration

- Introduction of specified time lines and implementation of stricter timelines for the parties as well as the tribunal to streamline the proceedings*
- Improved means of tribunal constitution (for example, requiring the claimant to nominate its arbitrator in its initial notice of claim)
- Time limit of 20 days for filing a disqualification motion*
- Time limits on preliminary/jurisdictional objections and early determination by tribunals
- Steps taken by a party after expiry of a time limit to be disregarded unless the late party establishes there were special circumstances justifying the delay. A request for extension of a time limit must be reasoned and may only be granted if made prior to expiry of the time limit*

[69] See for example, ICC, Effective Management of Arbitration — A Guide for In-House Counsel and Other Party Representatives, available at https://iccwbo.org/publication/effective-management-of-arbitration-a-guide-for-in-house-counsel-and-other-party-representatives/

[70] ICSID, supra note 11

- Tribunals to use best efforts to meet time limits for issuing orders, decisions and awards with a new duty to advise parties if they are unable to do so and to state when they anticipate meeting the time frame[71]
- Tribunals to address document production with parties during the first session and list the relevant considerations when deciding disputes arising out of document production
- Awards to be rendered within 60 days after the last submission on an application for manifest lack of legal merit, 180 days after the last submission on a preliminary objection and 240 days after the last submission on all other matters

(3) Measures to manage costs

- Establishment of a budget at the outset of a case
- Introduction of schedule of fees, including for arbitrators[72]
- Adoption of ceiling for overall costs
- Provide parties with enhanced, real-time information about the status of a case, including budget

(4) Improved management of the proceedings

- Consultations among the tribunal and parties regarding the organization of the proceedings including early case management conferences
- Use of procedural timetables
- Requirement of submission of statements/memorials in full detail
- Use of bifurcation including the provisions of relevant rules
- Use of modern technologies (for example, use of multimedia presentations and electronic transcripts during the hearing, videoconferencing, cloud-based document storage, data analytics and technology assisted document review)[73]
- Tribunals to hold consultations immediately prior to hearings and in-person deliberations immediately after hearings[74]
- Training of arbitrator on case management[75]

[71] ICSID, Annual Report 2017, p. 37. The 2015 Queen Mary University of London and White & Case International Arbitration Survey reported that a procedural innovation to reduce the time and cost of arbitration that met with the most positive, and least negative, response from its participants was the "requirement that tribunals commit to and notify parties of a schedule for deliberations and delivery of final award". Those interviewed for the survey said that they were "often kept in the dark about when awards would be rendered and would welcome being better informed".

[72] Relevant information available at https://icsid.worldbank.org/en/Pages/icsiddocs/Schedule-of-Fees.aspx.

[73] See Queen Mary University of London and White & Case, 2018 International Arbitration Survey: The Evolution of International Arbitration, pp. 31–33.

[74] ICSID, supra note 71.

[75] For example, ICC and other arbitration institutions provide training for arbitrators on case management.

(5) Frivolous or unmeritorious claims

- Availability of an effective early or expeditious dismissal mechanism[76]

(6) Rules on allocation of cost

- Clear and definitive rules on allocation of cost with tribunals making costs orders on an interim basis to keep parties cost-conscious* and being more willing to adjust costs
- In allocating costs, tribunals to consider specific factors, such as outcome, the parties' conduct, the complexity of the issues; and the reasonableness of the costs claimed* as well as the use of third-party funding

(7) Rules on security for cost for recovery

- Clear rules on security for costs[77] with possible suspension of the proceedings for non-compliance*

(8) Streamlining procedures for post-award remedies

- Streamlined procedure for interpretation, revision and annulment and strict timelines for decisions on supplementary decision and rectification as well as on interpretation, revision or annulment*

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[76] For example, ICSID Arbitration Rule 41(5) provides a mechanism to deal in the preliminary stages of arbitration with claims that are manifestly without legal merit. Over 20 applications for such dismissal had been made, leading to the conclusion that where such an application was successful, time and costs were saved. On the other hand, where the application failed, additional time and costs clearly arose (A/CN.9/930/Rev.1, para. 58). Several arbitral institutions have included express "early dismissal" provisions in their latest rules. In August 2016, SIAC introduced Rule 26 in its Investment Arbitration Rules for the early dismissal of claims and defences manifestly without legal merit or manifestly outside the jurisdiction of the Tribunal. In January 2017, SCC introduced in Rule 39 a "summary procedure" which a Tribunal may adopt (at a party's request) in relation to allegations of fact or law that are "manifestly unsustainable" or are "for any other reason, suitable to determination by way of summary procedure". In October 2017, the ICC published guidance designed to provide greater clarity on the scope for "*immediate dismissal of manifestly unmeritorious claims or defences*" under Article 22 of the 2017 ICC Rules. Some investment treaties also contain similar procedure.

[77] For example, article 22(1) of the draft Vietnam–EU Free Trade Agreement January 2016 provides that, "the Tribunal may order the claimant to post security for all or a part of the costs if there are reasonable grounds to believe that the claimant risks not being able to honour a possible decision on costs issued against the claimant". Article 22(2) states specifically the consequences for a breach of a security for costs order with the possibility of the tribunal ordering suspension or termination of the proceedings. See generally, Christine Sim, Security for Costs in Investor-State Arbitration, Arbitration International, Vol. 33, Issue 1, pp. 427–495 available at https://doi.org/10.1093/arbint/aix014.

(9) Others

- Allowing counterclaims by respondent States[78]
- Addressing abusive multiple/concurrent proceedings[79]
- Provisions on consolidation of proceedings[80]

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[78] It is quite common in ISDS for the respondent State to include in its defence to treaty claims one or more criticisms of the investor's underlying conduct. Yet while such arguments feature prominently in State defences, they are rarely framed as counterclaims seeking affirmative relief. The reason may lie in an instinctive preference by States to pursue any affirmative claims in their own courts. But it may also lie in perceived limits to the jurisdiction of international tribunals to hear State counterclaims. Provisions permitting counterclaims are being provided for in recent investment treaties. Certain arbitration rules, such as Rule 40 of the ICSID Arbitration Rules on ancillary claims, also provided for such a possibility. While allowing respondent States to raise counterclaims may eventually lead to a quicker resolution of all relevant disputes, the fact that the tribunal would need to consider those counterclaims in its proceeding may also lead to increased cost and duration. See Jean E. Kalicki, Counterclaims by States in Investment Arbitration, available at https://www.iisd.org/itn/2013/01/14/counterclaims-by-states-in-investment-arbitration-2/. See also two recent ICSID decisions on the issue of jurisdiction over State counterclaims: Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1 (available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/06/1) and Antoine Goetz and others v. Republic of Burundi, ICSID Case No. ARB/01/2 (available at https://icsid.worldbank.org/en/Pages/cases/casedetail.aspx?CaseNo=ARB/01/2).

[79] Treaty provisions on prohibiting abuse of process could provide the necessary mechanisms to allow arbitral tribunals to dismiss abusive claims and thus encourage investors to agree on a single forum for the resolution of their claims. See Hanno Wehland, "The Regulation of Parallel Proceedings in Investor-State Disputes", ICSID Review Vol. 31, Issue 3 (October 2016).

[80] Provisions on consolidation are also increasingly found in investment treaties (see A/CN.9/881, paras. 32–34). The guidance provided to arbitral tribunals in certain investment treaties is that the tribunal must rule in the interest of fair and efficient resolution of the claims when considering whether to consolidate. Consolidation may also be carried out under applicable institutional arbitration rules. However, it is usually not possible to consolidate proceedings which have started under different arbitration rules and/or administered by different arbitration institutions.

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Summary of the intersessional regional meeting on investor-State dispute settlement (ISDS) reform submitted by the Government of the Republic of Korea

This Note reproduces a submission from the Government of the Republic of Korea containing a summary of the intersessional regional meeting on ISDS reform held on 10 and 11 September 2018 in Incheon, Republic of Korea. The English version of the summary was submitted on 28 September 2018 and the text received by the Secretariat is reproduced as an annex to this Note.

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Annex

1. At its thirty-fifth session (New York, 23–27 April 2018), the Working Group welcomed a proposal from the Government of the Republic of Korea to organize an intersessional regional meeting on ISDS reform with the objectives of raising awareness in the Asia-Pacific region of the current work of the Working Group, and providing input to the current discussions. It was clarified that the meeting would be purely informational and that no decisions would be made. It was further mentioned that a summary report would be submitted to the next session of the Working Group for its consideration (A/CN.9/935, para. 11).

2. At its fifty-first session (New York, 25 June–13 July 2018), the Commission welcomed the invitation of the Republic of Korea to an intersessional regional meeting to be held in Incheon on 10 and 11 September 2018. The Commission took note that, while it was clear that no decisions would be taken at the intersessional meeting, the event would provide an open forum for high-level government representatives and relevant stakeholders in the Asia-Pacific region to discuss issues being deliberated by Working Group III.[1]

3. Accordingly, the first Inter-sessional Regional Meeting on ISDS Reform was held on 10 and 11 September 2018 at the Songdo Convensia in Incheon, Republic of Korea under the auspices of the Trade Law Forum (http://tradelawforum.com/). The Inter-sessional Regional Meeting was co-organized by the Ministry of Justice of the Republic of Korea, the Korea Legislation Research Institute (KLRI), the Korean Commercial Arbitration Board (KCAB) International, the Incheon Metropolitan City and the United Nations Commission on International Trade Law (UNCITRAL). The Inter-sessional Regional Meeting consisted of a one-day Conference providing regional perspectives on ISDS reform followed by a half-day roundtable discussions.

4. As indicated above, the objectives of the Conference were to raise awareness in the Asia-Pacific region of the current work of the Working Group, and to provide an opportunity to reflect on the ISDS experience in the Asia-Pacific region, further contributing to the discussions at the Working Group. The round table was to provide a forum for government representatives from the Asia-Pacific region to provide input to the current discussion at the Working Group. The Inter-sessional Regional Meeting was open to all those invited to the Working Group including delegations from other regions as well as other relevant stakeholders.

5. The Inter-sessional Regional Meeting was attended by a total of 191 participants, including government officials from 34 States (Afghanistan, Australia, Austria, Cambodia, Cameroon, Canada, China, Egypt, Iraq, Japan, Kuwait, Laos People's Democratic Republic, Mali, Mexico, Mongolia, Morocco, Myanmar, Nepal, Netherlands, Pakistan, Paraguay, Philippines, Qatar, Republic of Korea, Senegal, Singapore, Spain, Sri Lanka, Sudan, Thailand, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America and Vietnam) and representatives from the European Commission, the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration (PCA) as well as a number of non-governmental organizations.

The Conference (10 September 2018)

6. The Conference was opened by the Minister of Justice of the Republic of Korea (Mr. Sang-ki Park), who noted the increasing importance of ISDS in the Asia-Pacific region. The president of KLRI (Mr. Ik Hyeon Rhee), the chairman of KCAB International (Mr. Hi-Taek Shin) and the Mayor of Incheon (Mr. Nam Chun Park) also delivered welcome addresses.

[1] *Official Records of the General Assembly, Seventy-third Session, Supplement No. 17* (A/73/17), para. 146.

7. The Secretary of UNCITRAL then provided a general overview of UNCITRAL's work in the field of dispute settlement and the mandate of Working Group III on ISDS reform. It was highlighted that the Inter-sessional Regional Meeting was an effort to benefit from the widest possible breadth of available expertise from all stakeholders and to obtain high-level input from all governments as indicated in the Commission's mandate to the Working Group. The importance of transparency and experience-sharing in the Working Group process was emphasized.

8. The chairperson of Working Group III (Mr. Shane Spelliscy) then provided an overview of the concerns identified by the Working Group during the last two sessions, namely concerns pertaining to the consistency, coherence, predictability and correctness of arbitral decisions, to arbitrators and decision-makers, and to the cost and duration of ISDS cases. Noting that the Commission had expressed its appreciation for the progress made thus far, the chairperson noted that the Working Group was expected to address the second stage of its mandate at its next session while remaining open to the identification of any additional concerns. He encouraged increased participation from the region and mentioned the travel fund supported by the European Union and Switzerland to support participation of representatives of developing and least developed countries in sessions of the Working Group.

9. The Conference then proceeded to discuss the concerns identified during the past two Working Group sessions in four separate panels. The panels were construed to facilitate open discussion among the participants with speakers briefly presenting their perspectives on the topic followed by an interactive dialogue. Advance copies of notes prepared by the Secretariat for the thirty-sixth session of the Working Group were provided to the participants as reference material (A/CN.9/WG.III/WP.149 to 153).

Panel on costs and duration

10. The panel on costs and duration was moderated by Ms. Anna Joubin-Bret and consisted of the following speakers: Mr. Matthew Hodgson (Partner, Allen & Overy, Hong Kong), Ms. Sue Hyun Lim (Secretary-General, KCAB International) and Mr. Gonzalo Flores (Deputy Secretary-General, ICSID).

11. The panel discussion was based on currently available data on the cost and duration of investor-State arbitration, including mean and median party and tribunal costs, average length of proceedings, cost allocation trends as well as enforcement and settlement of cost awards. With regard to ICSID proceedings, it was indicated that the average duration for the period between July 2017 to June 2018 was 3.8 years for arbitration proceedings and 1.9 years for annulment proceedings.

12. By way of comparison, the PCA provided data on the duration of a few recent inter-State proceedings. It was noted that the anticipated length of proceedings was difficult to predict because of the varied nature of the cases. It was also noted that where parties set a time limit, the tribunals usually respected them. As to costs, figures similar to that of ISDS cases were not available for inter-State arbitration since the parties generally bore their own costs with no awards on cost being rendered.

13. It was stated that the regional experience in investor-State arbitration as well as commercial arbitration has led to a general perception that arbitration was no longer a faster and cheaper dispute resolution method. In that context, potential causes of increased costs and delays were discussed, such as lack of clarity in the rules, varied expectations of parties, dilatory tactics, scheduling difficulties and the inadequate use of party-appointed expert witnesses.

14. It was noted that the three main stages where time and cost could be reduced were the constitution of the tribunal, the written process including document production and rendering of the award. Concerns were expressed with regard to a lack of mechanisms for States to recover costs (it was mentioned that 37 per cent of cost awards in favour of respondent States remained unpaid) and the role of security for costs was highlighted. It was also noted that government officials might not be in a

position to agree to certain procedural measures to save costs and avoid delays, considering the potential risks associated with them.

15. Possible ways to reduce cost and duration were also mentioned. It was noted that measures to address such concerns as outlined in A/CN.9/WG.III/WP.153 provided a good starting point for discussion and focus was put on the introduction of timelines, active and effective case management, other means of amicable settlement, expedited procedures, early dismissal mechanisms and cost allocation. References were made to the proposed amendments to the ICSID Rules, including expedited arbitration. The possible establishment of an advisory centre to assist States before and during the ISDS proceedings also drew the attention of participants. References were made to domestic laws capping recoverable costs as a means to increase efficiency. While the wide variation in costs may make it difficult to set a definitive cap, it was said that tribunals could address the divergence of the circumstance in their awards on cost. Overall, the need to further improve the efficiency of ISDS was shared by the participants.

16. During the discussion, representatives of non-governmental organizations expressed concerns about the high cost associated with ISDS proceedings, in particular for developing countries, which may utilize the required financial resources for other policy reasons. The need to respect the States' right to regulate for such policy purposes was emphasized and it was further suggested that the proposed reforms should not be limited to procedural aspects but be broader to encompass substantives provisions in investment agreements.

Panel on the lack of predictability, correctness and coherence

17. The panel on the lack of predictability, correctness and coherence was moderated by Ms. Vilawan Mangklatanakul (Director-General, Department of International Economic Affairs, Ministry of Foreign Affairs, Thailand) and consisted of the following speakers: Ms. Karin L Kizer (Attorney-Adviser, Office of the Legal Adviser, Department of State, United States), Mr. Colin Brown (Deputy Head of Unit, Dispute Settlement and Legal Aspects of Trade Policy, Directorate-General for Trade, European Commission) and Mr. Shotaro Hamamoto (Professor, Graduate School of Law, Kyoto University).

18. The panel discussion focused on the importance and desirability of correctness, predictability and coherence of ISDS awards and their implications in the proper functioning of the ISDS regime as well as its legitimacy. The panel also focused on the underlying reasons that could have resulted in the seeming lack of such characteristics in the current ISDS regime. In that context, the public international law aspects of ISDS (being treaty-based), the existence of numerous investment agreements with broadly-drafted yet similar provisions, the ad hoc nature of ISDS tribunals, variance of parties to ISDS and limited possibilities of review were mentioned. Concerns were expressed not only with regard to inconsistency of awards but also to inconsistency in decisions on challenges to arbitrators.

19. The approaches of other international judicial bodies, such as the International Court of Justice (ICJ) and International Tribunal for the Law of the Sea (ITLOS), on the issue of consistency were mentioned. For example, reference was made to an ICJ decision which held that the issue was whether there was any cause not to follow the reasoning and conclusions of earlier cases. While the need to follow earlier decisions and thus to avoid fragmentation was highlighted, instances where departure from earlier decisions could be justified (for example, change of societal views, or a manifestly incorrect decision) were also mentioned. It was also cautioned that pursuit of consistency might inadvertently result in the consolidation of wrong decisions.

20. It was also stated that questions relating to the lack of consistency and predictability were relative and that in the current ISDS regime, the point of reference should be whether the interpretation by the tribunals was consistent with the intent of the parties to an investment treaty. In that context, the decentralized nature of the current ISDS regime, both politically and operationally, was highlighted. It was

further mentioned that a number of factors contributed to different decisions by tribunals (for example, the clarity of the treaty language, the facts of the case, litigation techniques and level of experience of the disputing parties) and that these factors need to be considered when assessing whether the apparent inconsistency may be justified.

21. Existing tools and efforts by States to enhance predictability, correctness and coherence were mentioned. They included more precise drafting of substantive obligations in investment treaties thus providing less discretion to tribunals in their interpretation. Different approaches to ISDS, excluding investment arbitration entirely from investment agreements, relying on State-to-State dispute resolution or excluding certain sectors from ISDS were also noted. It was stated that consistent submissions by States, the use of non-disputing party submissions, enhanced transparency and publication of pleadings and awards, consolidation of proceedings with the same facts and circumstances under a single treaty, limitations on parallel proceedings and binding interpretations by the treaty parties were tools that would promote correctness of decisions, consistent with the intentions of the treaty parties. In that context, it was also mentioned that the ad hoc nature of the current ISDS regime, which allows for competing interpretations, might eventually lead to the emergence of correct decisions.

22. On the other hand, it was said that the existing tools and efforts mentioned above would not sufficiently address the concerns and that systemic reform was therefore necessary. For example, the use of binding interpretation was possible only in limited circumstances and even carefully drafted language in investment treaties would not guarantee predictability as abstract notions were often subject to interpretation. It was also pointed out that treaties are often intentionally drafted with open-ended language. It was mentioned that systemic change could bring permanence creating predictability and consistency and that the introduction of an appeal mechanism could ensure correctness.

23. A number of questions were raised about how a systemic reform would address the concerns expressed and the mechanism to bring about such systemic reforms. It was mentioned that the Mauritius Convention on Transparency could provide a model to implement such systemic reforms to the existing ISDS regime.

24. Discussion also occurred concerning whether and how an appellate mechanism could enhance consistency, correctness and predictability of ISDS awards and a wide range of views were expressed.

25. In that context, reference was made to the core public law issues involved in ISDS, including legitimate welfare objectives, which should be assessed through domestic courts. On the other hand, international tribunals had the jurisdiction to, and had in fact, overturned domestic court decisions. It was also said that domestic court decisions should not interfere with international obligations, and a multilateral tribunal would provide the appropriate forum to assess these obligations.

Panel on arbitrators including a code of ethics

26. The panel on arbitrators (decision-makers) was moderated by Ms. Natalie Yu-Lin Morris-Sharma (Director, International Legal Division, Ministry of Law, Singapore) and consisted of the following speakers: Mr. Seung-wha Chang (Dean, Seoul National University School of Law, former member of the World Trade Organization (WTO) Appellate Body), Mr. Jeremy Sharpe (Partner, Sherman & Sterling London) and Ms. Christel Tham (Legal Counsel, Permanent Court of Arbitration).

27. At the outset, it was queried whether the party-appointment mechanism, which was drawn from international commercial arbitration, was fully suitable in the ISDS context. Potential alternatives included a roster or list system, so that potential arbitrators would be nominated before the dispute arose, which would allow States to look beyond the needs of a particular case and incentivise them to nominate

well-balanced arbitrators. The practice in ICSID of States nominating persons to the panel of arbitrators (and its rigidity) and of WTO with an indicative list of panel members were cited.

28. Recent trends in State practice with regard to appointment of arbitrators were shared. It was identified that in addition to independence and impartiality, qualities often required of arbitrators were expertise in public international law and investment law, subject-matter expertise and sectoral or case-specific knowledge. Emphasis was put on the need for arbitrators to understand how governments operated, to give effect to treaty provisions specifically negotiated by States (including tools for States to be involved in treaty interpretation) and to understand the important public policy consideration underlying ISDS cases. In that context, the need for States to re-examine their own practices of appointing arbitrators as well as nominating to the ICSID panel of arbitrators was mentioned. It was also noted that some States made efforts to avoid repeat appointments of arbitrators whereas others found it difficult to diversify arbitrators from outside the usual pool.

29. Noting that the appointment process was mostly party-driven, the PCA shared its experience in ISDS as appointing authority and its efforts to ensure the effectiveness of the arbitration and to protect the parties' access to justice. Statistics with regard to challenges to arbitrators in over 190 cases which the PCA administered was shared and it was stated that mechanism was "functioning". It was indicated that 80 per cent of the cases proceeded without any challenge, and that among the cases where an arbitrator was challenged, less than half resulted in a change in the composition of the tribunal.

30. The discussions then revolved around ethical requirements of arbitrators in ISDS cases, such as reflected in disclosure requirements and at issue in challenge procedures. It was mentioned that there have been continuous efforts to develop a code of conduct as well as guidelines on the topic resulting in some existing texts. It was further mentioned that issue conflicts in ISDS cases needed to be approached differently from that in commercial arbitration and suggestions were made that provisions tailored to issues conflicts in ISDS cases could be codified. In that context, reference was made to the relevant provisions in the code of conduct maintained by the WTO for both panellists and Appellate Body members.

31. While recognizing the benefits of such efforts and of existing codes of conduct, it was cautioned that they may need to be further tailored to the ISDS context (including the public policy aspect) and that overlap among such codes should be avoided. The possible interaction among a number of codes as well as with national laws was mentioned.

32. Discussions also evolved around a number of related issues including the need for a code of conduct for arbitrators and mediators, so-called "double-hatting" and the apparent bias as a perceived risk and the lack of arbitrators from the Asia-Pacific region handling ISDS cases.

Panel on third-party funding

33. The panel on third-party funding was moderated by Mr. Jiang Chenghua (Deputy Director-General, Department of Treaty and Law, Ministry of Commerce, China) and consisted of the following speakers: Ms. Teresa Cheng (Secretary for Justice, Hong Kong Special Administrative Region) and Mr. Nikolaus Pitkowitz (Partner, Graf & Pitkowitz, Vienna).

34. At the outset, the increasing impact that third-party funding has had on ISDS was noted and it was suggested that the topic required careful consideration in conjunction with a number of topics previously discussed. It was further mentioned that the concept as well as the regulation of third-party funding would need to be considered in the context of existing notions such as the doctrines of maintenance and champerty, confidentiality and preservation of privilege. With regard to the definition, references were made to the 2014 IBA Guidelines on Conflicts of Interest, the

ICCA-Queen Mary Task Force Report on Third-Party Funding and the proposed amendments to the ICSID Arbitration Rules.

35. The panel discussions evolved around the advantages and disadvantages of third-party funding generally and more specifically in the context of ISDS. It was however noted that such advantages and disadvantages were subjective in nature and relative to a number of other elements. For example, while third-party funding could enhance access to justice for investors, respondent States may not obtain such funding resulting in a systemic imbalance. While third-party funding might incentivize claims resulting in an increased number of ISDS cases, due diligence by funders might operate as a filter against frivolous or unmeritorious claims. While third-party funders would generally favour improved case management, there existed the risk of excessive control by the third-party funders of the proceedings.

36. The discussion also touched upon a number of issues specific to ISDS including conflict of interests among all stakeholders, security for costs when third-party funding is involved and the possibility of enforcing cost awards against third-party funders. It was further pointed out that third-party funding posed a more fundamental public policy question relating to the legitimacy of ISDS, as third-party funders would be profiting from a dispute between an investor and a State. In response, it was noted that there was a need to recognize the existence of a market for such third-party funding. Questions about admissibility of claims were also raised.

37. It was mentioned that regulation of third-party funding would entail discussion of the scope of such funding and who would be able to access it. It would typically require disclosure of the third-party funder but the details remained open for discussion. In that context, a question was raised on how to ensure the compliance of any disclosure requirements and remedies available to address any non-compliance by the parties.

38. Questions relating to whether third-party funding of mediation could be conducive to amicable settlement of disputes, whether there was a linkage between third-party funding and the amount claimed by investors and the fact that States had limited access to third-party funding as they usually did not suffer damages and as they did not necessarily have the opportunity to raise counterclaims were posed during the discussion.

The roundtable discussions (11 September 2018)

39. On 11 September 2018, two roundtable discussions took place with government representatives and other participants sharing their views on concerns relating to ISDS and on the desirability of reforms in light of those concerns. The two roundtable discussions were moderated by Mr. Jaemin Lee (Professor, Seoul National University School of Law) and Mr. Shane Spelliscy respectively.

40. The participants were reminded of the three-stage mandate of the Working Group. They were also reminded that the focus of the deliberations at the Working Group was on reforms to procedural aspects of ISDS and not on the underlying substantive obligations in investment agreements. It was also mentioned that considering the progress made by the Working Group, discussions on possible reform options would only be preliminary.

41. The concerns raised and identified by the Working Group during its two previous sessions and discussed the previous day at the Conference (as outlined in document A/CN.9/WG.III/WP.148) were generally shared by the participants. In conjunction with those concerns, a number of questions were raised on existing and proposed tools to address such concerns and discussions also evolved around the desirability of such reforms.

42. Nonetheless, it was also mentioned that the existing ISDS regime was relatively stable and predictable, providing investors and States a sound mechanism to resolve disputes in a de-politicized manner. It was also said that existing tools along with

minor adjustments could effectively address concerns raised particularly with regard to cost and duration.

43. The importance of dispute prevention (including a joint committee of the treaty parties) and other means of dispute resolution (including mediation) to reach an amicable settlement was highlighted. The use of cooling-off periods and mandatory consultations were also mentioned. With respect to mediation, it was noted that the ability for governments to settle might be limited particularly when compensation for damages were involved and the difficulties in coordination among relevant agencies within the government was mentioned. It was added that these tools were currently being under-utilized and efforts should be taken to increase their use, though it was also noted that unsuccessful attempts to settle could lengthen proceedings in some cases.

44. A number of proposed reforms to address the lack of consistency and to ensure correctness of awards were discussed, including scrutiny of awards and a system of precedents. A general issue was whether there might be tension between the twin aims of correctness and consistency. It was said that cases with similar legal issues and facts could be addressed together to enhance predictability and to reduce costs. However, it was also highlighted that reforms should not depart from a treaty-based approach. It was said that States should retain the authority to comment on interpretation of treaty provisions they negotiated.

45. As regards arbitrators, there was broad agreement that three areas required further elucidation. First, rules on conflicts of interest, external activities and double-hatting; second, arbitrator qualifications, which should include expertise in public international law and a balanced understanding of public policy. Third, gender balance and greater regional diversity, especially increasing appointment of arbitrators from developing States. It was added that recent treaties had attempted to address those issues, and that the recent expansion of the arbitrator community could facilitate such reforms. Finally, it was agreed that increased transparency in appointments would be critical for a successful reform.

46. A number of questions related to how a systemic reform of the ISDS regime could be implemented through the establishment of a permanent body. Questions related to the organization and structure of such a body; budget requirements and funding; ways to obtain the consent of the investors to the new dispute resolution mechanism; and finality as well as enforcement of the decisions by the permanent body.

47. A number of comments were made with regard to an appeals mechanism and its possible benefits, particularly in achieving correctness and consistency of awards. Similar to discussions at the Conference, a number of questions were raised on how such mechanism could be introduced to the current ISDS regime. Caution was expressed that introduction of an appellate stage could have a negative impact on the overall duration of ISDS proceedings.

48. In addition, the need for ISDS reforms to take into account other policy considerations such as sustainable development, human rights and environment, was mentioned. It was suggested that representatives of bodies responsible for such issues within and outside the United Nations system should be given the opportunity to voice their views in the Working Group. Recognizing the importance of the governments' right to regulate and the regulatory chill that may result from ISDS, a view was expressed by a member of civil society that the current ISDS regime lacked legitimacy and should be replaced in its entirety.

49. More generally, it was stated that the Inter-sessional Regional Meeting provided an opportunity for States not having participated in the Working Group to keep abreast of the recent developments and for States in the Asia-Pacific region and others to share their experience and to discuss common issues on ISDS. It was also mentioned that the difference in format (presentations on specific topics followed by question and answers) allowed for a more candid discussion and the opportunity for certain

States to develop internal capacity and expertise. It was stated that this would allow them to take part in the Working Group discussion more easily. It was further noted that the Inter-sessional Regional Meeting provided a number of civil society representatives the opportunity to provide input to the Working Group. In that context, it was generally felt that there would be benefit in holding additional intersessional meetings and in other regions.

50. The participants generally agreed on the importance of wide and diverse representation in the Working Group from all stakeholders, and of coordination between the UNCITRAL Secretariat and other relevant international organizations such as the United Nations Conference on Trade and Development, the Organization for Economic Cooperation and Development, ICSID and PCA. In addition, the transparency of the UNCITRAL process and the provision of the breadth of the materials available from various sources on its website were welcomed.

51. Participants expressed their gratitude to the Ministry of Justice of the Republic of Korea and the UNCITRAL Secretariat as well as other co-hosts for organizing the first Inter-sessional Regional Meeting on ISDS Reform and hoped that the discussions at the Inter-sessional Regional Meeting could provide useful input in the Working Group session scheduled for Vienna from 29 October to 2 November 2018.